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No. 03-1392

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALPHONSO STRIPLING,

Petitioner,

v.

FREDRICK HEAD, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

Whether this Court should decline to grant certiorari to examine a decision by the Georgia Supreme Court merely involving the review of a state procedural rule that is in accordance with the precedent of this Court and that does not present a federal constitutional question for this Court's review?

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PART ONE

STATEMENT OF THE CASE

These crimes occurred on October 15, 1988. Petitioner was indicted on October 16, 1988, by the Douglas County grand jury for the murder of Gregory Bass, the murder of Anthony Evans, the armed robbery of a Kentucky Fried Chicken restaurant, the armed robbery of Jacquelyn E. Priest, the aggravated assault of Moses Swanson, and the aggravated assault of Ghassem Hamadany. Petitioner filed a special plea of incompetence on June 5, 1989. A competency trial was held on June 19-20, 1989. The jury found Petitioner competent to stand trial on June 20, 1989. The trial of the case-in-chief began on June 21, 1989, and ended on July 1, 1989. The jury found Petitioner guilty on all counts charged in his indictment.

At the conclusion of the sentencing phase, with regard to count one, the murder of Gregory Bass, the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt: (1) that the murder was committed while Petitioner was engaged in the murder of Anthony Evans, (2) that the murder was committed while Petitioner was engaged in the armed robbery of Moses Swanson, and (3) that the murder was committed by a person with a prior conviction of armed robbery. With regard to count two, the murder of Anthony Evans, the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt: (1) that the murder was committed while Petitioner was engaged in the commission of the murder of Gregory Bass, (2) that the murder was committed while Petitioner

was engaged in the armed robbery of Moses Swanson, and (3) that the murder was committed by a person with a prior conviction of armed robbery.[1] The jury returned death sentences for Petitioner on both murder counts. The judge then sentenced Petitioner to death on both of these counts, and further sentenced Petitioner to life imprisonment on count three, armed robbery, life imprisonment on count four, armed robbery, twenty years on count five, aggravated assault, and twenty years on count six, aggravated assault, to run consecutively.

Petitioner filed a motion for new trial on August 9, 1989. This motion, as amended, was denied, after hearing, on April 27, 1990. Petitioner filed his notice of appeal in the Georgia Supreme Court on May 29, 1990. The Georgia Supreme Court affirmed Petitioner's convictions and sentences on February 22, 1991. *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991). Petitioner's motion for reconsideration was denied on March 15, 1991. Petitioner filed a Petition for Writ of Certiorari in this Court which was denied on December 2, 1991. *Stripling v. Georgia*, 502 U.S. 985 (1991). Petitioner's Petition for Rehearing was denied on February 24, 1992. *Stripling v. Georgia*, 502 U.S. 1124, 112 S.Ct. 1249 (1992).

Petitioner filed a state habeas corpus petition on June 15, 1995, and amended that petition on March 5, 1998.

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[1] Although the Georgia Supreme Court found that the murders served as mutually supporting aggravating circumstances, the Court found that each of Petitioner's death sentences were adequately supported by independent armed robbery statutory aggravating circumstances. *Stripling v. State*, 261 Ga. 1, 7-8, 401 S.E.2d 500 (1991). Accordingly, both of his death sentences were affirmed.

The evidentiary hearing in the state habeas case was held on April 2-4, 2002, and evidence was presented by both parties on Petitioner's claims. Post-hearing briefing by the parties followed. On October 7, 2002, the state habeas court granted Petitioner's petition for habeas corpus relief, holding, *inter alia*, that the statutory burden of proof of mental retardation beyond a reasonable doubt applicable to Petitioner violated Georgia's Constitution as well as the United States Constitution. Respondent filed a notice of appeal of the habeas court's findings on November 14, 2002.

Following briefing and oral argument by the parties, the Georgia Supreme Court on October 14, 2003, affirmed, in part, and reversed, in part,[2] the state habeas court's findings, reversing the portion of the state habeas court's order wherein the court found that the beyond a reasonable doubt statutory burden of proof of mental retardation violated the state and federal constitutions.

Respondent/Appellant then filed a motion for reconsideration of the portion of Georgia Supreme Court's decision affirming findings by the state habeas court, which was denied on November 26, 2003.

Thereafter, Petitioner filed the instant petition in this Court on April 5, 2004. The sole question presented in his petition is whether the Georgia Supreme Court erred in

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[2] This ruling by the Georgia Supreme Court did not impact the finality of Petitioner's convictions, but required that Petitioner's case be remanded to the trial court for a new trial on the issue of his alleged mental retardation, as well as a new sentencing trial in the event that the jury finds that he has failed to establish his alleged mental retardation beyond a reasonable doubt.

reversing the lower court's finding as to the statutory burden of proof for Georgia capital defendants alleging that they are mentally retarded to avoid a death sentence in the event of a finding of guilt at trial.

DENIAL OF FACTUAL ALLEGATIONS SET FORTH IN PETITION

Respondent denies the allegation set forth in Petitioner's petition wherein he implies that he has demonstrated that he is mentally retarded under any standard.

Respondent further denies the implication in Petitioner's petition that the State's only evidence presented at trial on the issue of mental retardation consisted of evidence casting doubt on Petitioner's mother's testimony, a previous IQ score contrary to the IQ score reported by Petitioner's expert at trial, and the State expert's "guesstimate" that Petitioner's IQ was in the normal range at the time of his crimes. In fact, the expert called by the State testified at trial, based on his clinical interview of Petitioner and other evidence, that Petitioner did not meet the criteria for a diagnosis of mental retardation. Tr. T. 2306-2307.

PART TWO

STATEMENT OF THE FACTS

The evidence supporting Petitioner's convictions is briefly summarized as follows:

On October 16, 1988, at approximately 12:15 a.m., Petitioner, Alphonso Stripling, a cook-trainee at a Kentucky Fried Chicken restaurant (hereinafter "KFC") in

Douglas County, Georgia, robbed the KFC at gunpoint shortly after it closed for the evening. The evidence showed that during the course of the robbery, Petitioner shot each of his four co-workers, killing two and seriously injuring the others. Petitioner then fled on foot with the cash receipts from the KFC which totaled over sixteen hundred dollars. A few moments later, Petitioner stole a getaway car at gunpoint and began to drive toward Atlanta, ultimately leading sheriff's deputies on a high-speed chase that reached one hundred and ten miles per hour. Petitioner was arrested after deputies wrecked the car that he was driving on a freeway exit ramp.

At the time of his arrest, Petitioner was in possession of "the stolen car, the restaurant receipts, and the murder weapon." *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO EXAMINE A DECISION BY THE GEORGIA SUPREME COURT MERELY INVOLVING THE REVIEW OF A STATE PROCEDURAL RULE THAT IS IN ACCORDANCE WITH THE PRECEDENT OF THIS COURT AND THAT DOES NOT PRESENT A FEDERAL CONSTITUTIONAL QUESTION FOR THIS COURT'S REVIEW.

Petitioner has filed the instant petition for writ of certiorari because he disagrees with the Georgia Supreme Court's decision to reverse the lower court's finding that the state statute requiring him to prove his alleged mental

retardation beyond a reasonable doubt[3] violates the Due Process Clause of the United States Constitution. However, as this decision by the Georgia Supreme Court comports with the clear precedent of this Court and does not present a federal constitutional question for this Court's review, this petition for writ of certiorari should be denied.

In reversing the state habeas court's finding as to the constitutionality of Georgia's statutory burden of proof of mental retardation applicable to Petitioner at trial, the Georgia Supreme Court held as follows:

> This issue has already been decided adversely to Stripling. *See Head v. Hill*, 277 Ga. 255 (587 S.E.2d 613, 2003 Ga. LEXIS 850) (Case No. S03A0559, decided (2003)); *see also Mosher v. State*, 268 Ga. 555 (4) (491 S.E.2d 348) (1997). O.C.G.A. § 17-7-131 is constitutional, and the portion of the habeas court's order to the contrary is reversed. On retrial, Stripling must bear the burden of proving his alleged mental retardation beyond a reasonable doubt. *See Head*, *supra*.

Head v. Stripling, 277 Ga. 403, 590 S.E.2d 122 (2003).

In *Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613 (2003), a case decided prior to the decision by the Georgia Supreme Court in the instant case, the Georgia Supreme Court set out its rationale for adhering to its prior ruling affirming Georgia's statutory burden of proof applicable to mental

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[3] O.C.G.A. § 17-7-131 states, in part, "The defendant may be found 'guilty but mentally retarded' if the jury, or the court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded."

retardation claims following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), by stating the following:

> Now that the Georgia exemption from death sentences for mentally retarded persons is paralleled by a new federal exemption, we must determine whether, under the authority of federal constitutional law, the beyond a reasonable doubt standard continues to be an acceptable standard of proof to apply to mental retardation claims.
>
> As we noted above, *Atkins* specifically left "'to the States the task of developing appropriate ways to enforce the [federal] constitutional restriction'" on executing the mentally retarded. *Atkins v. Virginia*, *supra* at 317 (III). Furthermore, nothing in *Atkins* instructs the states to apply any particular standard of proof to mental retardation claims. . . . Therefore, we must apply Georgia law, which was the first in the nation to prohibit the execution of the mentally retarded, in a manner which is consistent with established federal constitutional principles as they have been announced with respect to other, comparable rights.
>
> As we reasoned in *Mosher*, a mental retardation claim is comparable to a claim of insanity at the time of the crime in that both relieve a guilty person of at least some of the statutory penalty to which he would otherwise be subject. Accordingly, we took guidance from *Leland v. Oregon*, 343 U.S. 790 (72 S.Ct. 1002) (1952), which approved application of the beyond a reasonable doubt standard to insanity claims, and we concluded that the same standard could be applied constitutionally to mental retardation claims. *Mosher v. State*, *supra* at 559-560 (4). We again

> find the comparison between claims of insanity and of mental retardation to warrant a conclusion that the beyond a reasonable doubt standard may be applied constitutionally to mental retardation claims.
>
> Furthermore, as expressed in *Mosher*, supra at 560 (4), we again distinguish the fundamental right not to stand trial implicated in *Cooper v. Oklahoma*, 517 U.S. 348 (116 S.Ct. 1373) (1996) from the procedural burden of proving mental retardation. Contrary to the dissent's obviously inaccurate reading of *Mosher*, this Court specifically applied federal precedent and did not hold that such "precedent had no bearing on what burden of proof could be imposed. . . . " Dissenting opinion, p. 271, fn. 13. Indeed, we have repeatedly rejected the application of *Cooper's* preponderance of the evidence standard to cases involving retardation even as the number of other jurisdictions requiring proof by a higher standard has increased from two to five.
>
> * * *
>
> Since the reasonable doubt standard is clearly constitutionally permissible for insanity determinations, and we have already applied *Cooper* and other federal authority to the choice of a standard of proof in mental retardation cases, and the General Assembly has selected the reasonable doubt standard, we believe that *Cooper* should not be extended to retardation decisions unless the Supreme Court of the United States so requires at some future date.

Head v. Hill, 277 Ga. at 260-261.

The Georgia Supreme Court further explained its rationale for adhering to its prior decision to affirm the

validity of this state procedural rule in light of state and federal constitutional principles as follows:

> . . . [W]e conclude that the special risks and limitations suffered by truly mentally retarded persons at trial are sufficiently counterbalanced by the joint safeguards of Georgia's procedure for demonstrating incompetency to stand trial under the preponderance of the evidence standard and mental retardation under the beyond a reasonable doubt standard. *See* O.C.G.A. §§ 17-7-130, 17-7-131 (c) (3), (j); *Partridge v. State*, 256 Ga. 602, 603 (1) (351 S.E.2d 635) (1987) ("the defendant has the burden to prove incompetency by a preponderance of the evidence").
>
> We also conclude that a higher standard of proof serves to enforce the General Assembly's chosen definition of what degree of impairment qualifies as mentally retarded under Georgia law for the purpose of fixing the appropriate criminal penalty that persons of varying mental impairment should bear for their capital crimes, in light of their individual "diminished . . . personal culpabilities" and the varying degrees of deterrence possible. *Atkins v. Virginia*, supra at 318-320 (IV).

Head v. Hill, 277 Ga. at 262.

The Georgia Supreme Court correctly concluded that its decision to affirm the validity of this state procedural rule comports with the holding of *Leland v. Oregon* wherein this Court affirmed Oregon's burden of proof of insanity despite the fact that all other states that had addressed that issue had state statutes containing lower burdens of proof.

The Supreme Court of Georgia also correctly concluded that its decision to affirm this state procedural rule did not conflict with the holding of *Cooper v. Oklahoma* which rested upon this Court's determination that the right not to be tried while incompetent was a long-standing, deep-rooted fundamental principle of common law to which common law had traditionally and consistently applied a preponderance of the evidence burden of proof. By contrast, the instant federal prohibition, which was only recently announced, clearly has no such attached deep-rooted, fundamental standard of proof. Accordingly, the Georgia Supreme Court properly held that this state procedural rule did not violate the requirements of *Cooper*.

Finally, the Supreme Court of Georgia likewise correctly held that its decision to affirm this state procedural rule comports with the clear and explicit directive of this Court in *Atkins* leaving "to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences," 536 U.S. at 317, just as it did in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986), with regard to the determination of the issue of competency to be executed.

Thus, as the Georgia Supreme Court's decision to reaffirm this state procedural rule presents no federal constitutional question warranting this Court's consideration, this Court should deny this petition in its entirety.

CONCLUSION

WHEREFORE, because the Georgia Supreme Court's determination as to this issue does not conflict with the clear precedent of this Court and does not present a

federal constitutional question for this Court's review, Respondent prays that the petition for writ of certiorari filed on behalf of Alphonso Stripling be denied.

Respectfully submitted,

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REPLY BRIEF FOR THE PETITIONER

This Court observed in *Atkins* v. *Virginia* that "some characteristics of mental retardation undermine the strength of *the procedural protections that our capital jurisprudence steadfastly guards*." 536 U.S. 304, 317 (2002) (emphasis added). For example, mentally retarded defendants are more likely to give false confessions, less able "to make a persuasive showing of mitigation," and "less able to give meaningful assistance to their counsel." *Id.* at 320-321. Because of their reduced abilities, "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution" (*id.* at 321), and that is a "justification for a categorical rule making such offenders ineligible for the death penalty" (*id.* at 320).

But mentally retarded defendants may be put to death as easily by procedural rules as by the substantive laws that the Court condemned in *Atkins*. This case shows how. The habeas court found that the evidence Mr. Stripling presented at his criminal trial probably "was sufficient to prove his mental retardation by *at least* a preponderance of the evidence." Pet. App. 94a (emphasis added). However, under Georgia's statutory procedure, a defendant may be executed although he has proven that he is mentally retarded by a preponderance of the evidence – or even by clear and convincing evidence. Respondent does not dispute that Georgia's procedure will cause wrongful executions of mentally retarded defendants.

In *Cooper* v. *Oklahoma*, this Court held that "[b]ecause Oklahoma's procedural rule allows the State to put to trial a defendant who is more likely than not incompetent, the rule is incompatible with the dictates of due process." 517 U.S. 348, 369 (1996). Georgia's rule is even worse than the rule in *Cooper* because (1) it requires proof by a higher standard, and therefore allocates more of the risk of error to the defendant; and (2) the consequences of error are far more pro-

found: death by unconstitutional execution. The Georgia statute denies defendants due process by requiring them to prove their mental retardation beyond a reasonable doubt before they may invoke their substantive rights under *Atkins*. See *Cooper*, 517 U.S. at 362-367.

As we demonstrated in the petition, this Court should grant certiorari to review the Georgia Supreme Court's decision upholding the constitutionality of the Georgia statute. That decision (1) conflicts with the decisions of several other state courts of last resort, (2) cannot be reconciled with *Cooper*, and (3) is based on a flawed understanding of the federal due process limitations on state procedural rules. Respondent's arguments to the contrary are entirely unpersuasive.

1. Respondent does not even *attempt* to deny that state courts of last resort are split on the question presented. See Pet. 10-12. Nor does he deny that this split will only get deeper until this Court resolves the question (*id.* at 14-15), or that review will provide necessary guidance to state legislatures and courts (*ibid.*). Instead of addressing these reasons why certiorari should be granted, respondent dwells on the entirely irrelevant facts of the crime (Br. in Opp. 1-5) and three pages of quotes from the Georgia Supreme Court's decision in *Head* v. *Hill*, 587 S.E.2d 613 (Ga. 2003) (see Br. in Opp. 7-9), which is reproduced in full in the Appendix to the Petition (at 106a-135a).

2. Respondent's assertion that the petition "does not present a federal constitutional question for this Court's review" (Br. in Opp. 6; see *id.* at i, 10-11) is completely frivolous. Respondent does not deny that petitioner raised the federal due process issue in both the habeas court and the Georgia Supreme Court, and in fact *quotes* the Georgia Supreme Court's explicit holding that the challenged statute "'is constitutional'" (Br. in Opp. 6 (quoting Pet. App. 12a)). Respondent confuses the jurisdictional question whether petitioner's constitutional claim was *presented to and resolved*

by the lower court with the entirely distinct issue of whether the lower court found a constitutional *violation*. There can be no dispute that petitioner raised, and the Georgia Supreme Court resolved, a federal constitutional challenge to Georgia's mental retardation statute. Thus, review by this Court is entirely appropriate.

3. Respondent's claim that the decision below is correct (Br. in Opp. 9, 10) entirely ignores our explanation of why the decision cannot be reconciled with *Cooper*. See Pet. 16-21. Respondent does not deny (a) that mentally retarded criminals have a federal constitutional right not to be executed, (b) that Georgia is the only state to require defendants to prove their own mental retardation beyond a reasonable doubt, or (c) that because of Georgia's procedural rule, mentally retarded defendants *will* be executed despite their mental retardation. That cannot possibly be called fair, directly subverts *Atkins*, and is barred by federal due process under *Cooper*. But even if the Georgia Supreme Court's resolution of the question presented were correct, the split among state courts of last resort on that question would nonetheless warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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